

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA TYLER)	
Claimant)	
VS.)	
)	Docket No. 211,530
KIERS THRIFTWAY)	
Respondent)	
AND)	
)	
ALLIED GROUP INSURANCE)	
Insurance Carrier)	

ORDER

Claimant requested review of the Award dated October 20, 1997, entered by Administrative Law Judge Bruce E. Moore.

APPEARANCES

Randy S. Stalcup of Wichita, Kansas, appeared for the claimant. Jeffrey E. King of Salina, Kansas, appeared for the respondent and its insurance carrier.

RECORD

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits for a 10 percent whole body functional impairment. Claimant requested Appeals Board review and contends she is entitled to an award for work disability. Nature and extent of disability is the only issue before the Appeals Board on this review.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of her employment on October 10, 1995, while bending over and stocking shelves in respondent's Mankato grocery store. The parties also stipulated that claimant's average weekly wage on the date of accident was \$152.94.

(2) As a result of the accident, claimant injured her low back. Claimant's diagnosis is degenerative disc disease with bulging at the L5-S1 intervertebral space. Claimant received conservative medical treatment and was released to return to work with permanent work restrictions in May 1996.

(3) Despite respondent's willingness to accommodate her, claimant did not attempt to return to work for respondent after recovering from her low-back injury because she preferred an office or clerical position.

(4) Claimant has not worked since the October 1995 accident. Claimant sought employment from employers other than respondent after her release to return to work in May 1996. However, she terminated an active employment search in January 1997. When claimant testified at the regular hearing in May 1997, she remained unemployed and had applied for social security disability benefits.

(5) Respondent's medical expert witness, board-certified orthopedic surgeon C. Reiff Brown, M.D., examined claimant in July 1996 and placed the following medical restrictions on claimant for her low-back injury:

She will have to permanently avoid lifting above 40 pounds occasionally, 25 pounds frequently and will have to do all lifting utilizing proper body mechanics. She should also avoid frequent bending more than 45 degrees and remaining in a flexed position of 45 degrees or greater for more than 10 to 15 minutes at a time.

(6) Claimant's medical expert witness, Daniel D. Zimmerman, M.D., examined claimant in June 1996 and wrote the following in his June 29, 1996, report:

"Miss Tyler is capable of lifting 20 pounds on an occasional basis, 10 pounds on a frequent basis. She should avoid frequent flexing of the lumbosacral spine and, hence, should avoid frequent bending, stooping, squatting, and crawling activities as all such activities, repetitively carried out or carried out [*sic*] or carried out [*sic*] over extended periods of time, would be likely to increase pain and discomfort affecting the lumbar paraspinous musculature. She also should avoid being seated for extended periods of time as the severity of her radicular pain and discomfort precludes her maintaining a seated posture for extended periods of time."

(7) Neither Dr. Brown nor Dr. Zimmerman indicated claimant was unable to work or placed restrictions on claimant which could be interpreted as prohibiting claimant from essentially all substantial, gainful employment.

(8) Based upon claimant's vocational expert witness, Karen C. Terrill, the Appeals Board finds claimant retains the ability to earn at least \$150 per week despite the back injury. The Appeals Board takes official notice that a job paying the federal minimum wage rate of \$5.15 per hour would yield a gross wage of \$206 per week for a 40-hour workweek.

(9) Any low-back condition which claimant had before the October 1995 accident was unknown and asymptomatic.

(10) Similar to the Administrative Law Judge, the Appeals Board also finds that claimant has sustained a 10 percent whole body functional impairment as a result of the October 1995 accident. Dr. Brown testified claimant's functional impairment was 6 percent and Dr. Zimmerman testified it was 21 percent.

(11) The Appeals Board adopts the findings set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

Because hers is an "unscheduled" injury, claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 44-510e which provides in part as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

The wage loss prong of the permanent partial general disability formula set forth above was considered in Copeland v. Johnson Group, Inc., 24 Kan. App.2d 306, 944 P.2d 179 (1997), where the Court of Appeals held a worker's post-injury wage would be imputed and based upon the ability to earn unless the worker put forth a good faith effort to find and obtain appropriate employment.

Claimant has not put forth a good faith effort to obtain appropriate employment. As indicated above, claimant retains the ability to earn a wage comparable to the \$152.94 per week she was earning on the date of accident. Therefore, under the principles set forth in Copeland, claimant's permanent partial general disability benefits should be limited to the percentage of functional impairment.

K.S.A. 44-501(c) requires preexisting functional impairment to be deducted from an award of compensation. However, unknown, asymptomatic conditions do not create impairment or otherwise restrict an individual. Because claimant's low back was asymptomatic and did not impair claimant in any manner before the October 1995 accident, there is no preexisting functional impairment to be deducted.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated October 20, 1997, entered by Administrative Law Judge Bruce E. Moore granting claimant permanent partial general disability benefits for a 10% whole body functional impairment should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Jeffrey E. King, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director